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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 293

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A. F. BROOKS, DOING BUSINESS AS EAST SIDE ICE AND FUEL COMPANY, JAMES BROOKS, WILLIAM FRED HAYES AND MAGGIE MAY HAYES, CURTIS PALMER AND ROBERT HOOPS,

Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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HENRY WARTEN,
ROY COYNE,
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The petitioners, A. F. Brooks, doing business as East Side Ice and Fuel Company, James Brooks, William Fred Hayes and Maggie May Hayes, Curtis Palmer and Robert Hoops, pray that a writ of certiorari issue to review the opinion of the United States Circuit Court of Appeals entered in the above cause on July 6, 1943, reversing the judgment of the District Court of the United States for the Southwestern District of Missouri.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is found on pages 233 to 242 of the record filed herewith. The opinion of the District Court (R. 77-82) is reported in 43 F. Supp. 870.

Jurisdiction.

The opinion sought to be reviewed was entered on July 6, 1943 (R. 233). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. #347).

Questions Presented.

The Missouri cases of *Daub* v. *Maryland Casualty Co.*, 148 S. W. (2d) 58 and *State ex rel.* v. *Hughes*, 349 Mo. 1139, 164 S. W. (2d) 274 declared the Missouri law to be that under an exclusion clause of an insurance contract exempting from coverage the employees of the insured, the term employees, as used in the policy, did not include casual, temporary or incidental employees; that the word employee is commonly used as signifying continuous service, or as designating a person who gives his whole time and service to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continued services not limited to a particular transaction, or a person having a fixed tenure or position.

The questions are:

1. Should the Circuit Court of Appeals follow this rule or can the Circuit Court of Appeals reverse an opinion of the District Court, which follows the Missouri rule, and in its

opinion establish a new and different definition of the term employee, unsupported by authority, and directly in conflict with the controlling Missouri decision.

2. Should the Circuit Court of Appeals apply the rules of law laid down by the Missouri controlling decisions, in determining whether or not a person is an employee, or can the Circuit Court of Appeals disregard these rules and escape the binding effect thereof, by distinguishing the facts, and then pronouncing a new, different and conflicting general rule.

3. In interpreting an insurance contract, should the Circuit Court of Appeals follow controlling Missouri decisions defining 'employee' and 'casual' as such words are used in insurance policies or can it disregard such decisions and follow cases interpreting the statutory definition of 'casual' as contained in the Missouri Workmen's Compensation Act, when such opinions conflict and are based on entirely different underlying rules of law.

4. When the judgment of the District Court was based upon facts found especially after the court had heard controverted testimony and weighed its credibility, could the Circuit Court of Appeals reverse this judgment for the reason that it would have reached a conclusion at variance with that of the trial court?

Statement.

The State Farm Mutual Automobile Insurance Company brought an action for a declaratory judgment in the District Court against one of its policyholders and persons claiming under him. The suit was authorized by Section 274 (d) of the Judicial Code as amended (28 U. S. C. #400). Jurisdiction of the court was invoked because of diversity of citizenship between the parties.

The insurance company sought a declaration of nonliability under the following exclusionary clause of its policy:

> "This policy shall not apply * * *
>
> Under Coverage A, to bodily injury or to death of any employee of the insured while engaged in the business other than domestic employment of the insured, or while engaged in the operation, maintenance or repair of the automobile, or to any obligations for which the insured may be held liable under any workmen's compensation law, or to the insured or any member of the family of the insured." (R. 136).

Under this clause the insurance company sought to be relieved from its obligation to defend its insured, A. F. Brooks, and his son James Brooks, an additional insured under the policy, in suits brought against them in the State court by William Fred Hayes and Maggie May Hayes, the parents of Raymond Hayes, a sixteen year old boy who had been killed in an accident involving operation of the insured truck, and by Curtis Palmer, another sixteen year old boy who had been injured in the same accident and who had brought suit through his next friend, Robert Hoops. The insurance company further sought relief from its obligation to pay on behalf of the insured a judgment for the sum of $3,000.00 which William Fred Hayes and Maggie May Hayes had obtained against the insured in the State court as a result of their suit. The suit of Curtis Palmer was pending in the State court at the time of the trial in the District Court.

The trial was to the Court. The facts found by the court, sitting as a jury, in which the Circuit Court of Appeals concurred were: the policyholder was engaged in operating among other things a fuel yard at Joplin, Missouri; it was part of such operation to obtain wood from points outside Joplin; late in August and early in September,

1941, Raymond Hayes and Curtis Palmer, both sixteen years of age, accepted temporary employment at a place where the insured was obtaining wood by sawing a pile of slabs which had accumulated around a sawmill; they were hired to collect the wood and pile it for loading and transportation to Joplin in the truck insured under the policy; on September 3, 1941, and while the policy was in force, they were riding to Joplin on the loaded truck when an accident occurred which resulted in the death of Raymond Hayes and the injury of Curtis Palmer (R. 237).

From its opinion, the Circuit Court of Appeals apparently refused to concur in the finding entered by the trial court as follows:

> "At the time of the accident the said Raymond Hayes and Curtis Palmer were not engaged in the performance of the duties for which they were employed by the said A. F. Brooks, but were riding in the truck under an arrangement that they would be taken to and returned from the place of employment in the assured's truck" (R. 236).

The Circuit Court of Appeals found a discrepancy between the finding entered by the court and a requested finding of fact filed by the respondent which recited:

> "Raymond Hayes and Curtis Palmer, while in the employ of said A. F. Brooks and while engaged in the business of said A. F. Brooks were riding in the automobile truck * * *" (R. 237).

Refusing to accept the interpretation of this ambiguity which would support the judgment, the Circuit Court of Appeals held that although the boys were passive in riding on the truck, this ride was clearly within their employment in the business of the insured (R. 233).

The Circuit Court of Appeals reversed the judgment of the District Court on three of the above mentioned "Re-

quested Findings of Fact" which were filed by the respondent long after the trial court had entered its memorandum opinion (R. 77-82) and findings of fact and conclusion of law (R. 50-52). In arriving at its decision the Circuit Court of Appeals culled these three findings of fact out of a series, part of which the trial court had marked "given" and part "refused", and a series of conclusions of law submitted by the respondent, all of which the trial court had marked "refused" (R. 52-58). The three findings thus set apart by the Circuit Court of Appeals were substituted as so-called "facts found specially" for finding of fact 4, entered by the trial court as follows:

> "The alleged employment of Raymond Hayes and Curtis Palmer should be described by the words 'occasional, incidental or casual employment'. Admittedly, it was not regular or continuous employment. Both the employer and the employees, as well as the plaintiff, understood that" (R. 51).

From its assembled findings of fact the Circuit Court of Appeals arrived at a decision that the conclusion of the trial court was erroneous, and substituted its own conclusions that the employment of the two boys was not casual employment and that the claims asserted against the insured were not as a matter of law within the coverage of the policy and that the respondent was entitled to a declaratory judgment to that effect.

The Circuit Court of Appeals refused to accept Finding of Fact 4 entered by the trial court because it was "conclusion of law or of mixed law and fact." The language used by the court is a quotation from the description of "casual employment" found in the case of *Daub* v. *Maryland Casualty Company* (Mo. App.), 148 S. W. (2d) 58. In that case, the St. Louis Court of Appeals held that the word "employee" as used in insurance policies is ambiguous and generally denotes regular employment. The Dis-

trict Court concluded from the evidence that the two boys in the instant case were not employees of the insured within the purview of the policy under the decision in *Daub* v. *Maryland Casualty Company* and cases cited therein, and rendered judgment for the insured for attorney fees and expenses of the defense of the suits, and judgment obtained against the insured in the state court. Jurisdiction of the case was retained by the trial court for purpose of adjudication of the rights of Curtis Palmer against the respondent, and of other questions upon which the court reserved judgment.

The only issue in the case is whether or not the two boys were employees of the insured within the meaning of the policy. The record sustains the trial court's description of the employment of Raymond Hayes and Curtis Palmer, as occasional, incidental or casual employees, and clearly is against the conclusion of the Circuit Court of Appeals that the boys were employees in the regular business of the insured.

In the opening statement of counsel for the respondent, a distinction was drawn between Blackburn Stout, the regular yard man, and the two young men who were hired for the single transaction of bringing wood to the saw on the particular job at the slab pile (R. 90, 91).

The evidence showed that Raymond Hayes had gone to Brooks' place of business on the night of Saturday, August 30, 1941, seeking employment. He helped unload a load of wood that night and was paid twenty-five cents. He was that night engaged by Brooks to work for the duration of the job of sawing up the slap pile, a period of five or six days. His duties were to bring wood to the saw at the place where the sawing was being done (R. 131). The work commenced when he got to the slab pile and ceased when the saw stopped (R. 131). He was not one of the persons continuously employed, as was James Brooks (R.

119) and Blackburn Stout (R. 132), but was an extra worker hired for this particular job (R. 132).

On Sunday, August 31, he rode to the slab pile with Brooks and another boy and went swimming, and was not paid (R. 115). On Monday, September 1, he worked at the slab pile and rode home to Joplin on the loaded truck. He did not unload the truck (R. 115, 117, 118). On Tuesday, September 2, they did not go to the slab pile. Raymond Hayes did chores at the yard sorting cook wood from a pile of slabs. On Wednesday, September 3, he worked at the saw and was killed while riding home on the loaded truck (R. 119, 120). He was hired only for the duration of the job, because he wanted to earn $5.00 by Saturday night (R. 90, 131).

Curtis Palmer had done chores around Brooks' place of business, such as raking off the yard, when he wanted to earn twenty-five or fifty cents (R. 176). He had never worked steadily (R. 177). He worked at the slab pile carrying wood to the saw on Saturday, August 30, 1941 (R. 174). He did not work on the following Monday or Tuesday, but did work on Wednesday, the day of the accident (R. 177).

Both boys were to be paid $1.00 per day for their wages, although Brooks had paid as high as $2.00 per day (R. 122). His crews sometimes consisted only of Brooks' regular employees, and sometimes extra help which Brooks picked up in the vicinity of the particular sawmill where he had happened to purchase a slab pile. On some occasions he brought help from Joplin to the sawmill (R. 112). The rides to and from the slab piles on the truck which was used for transporting loads of wood formed no part of the consideration for the work, and it would have made no difference in their pay if the boys had not been given the rides (R. 168).

Whether it be termed a conclusion of law, or a finding of ultimate fact, the description applied by the trial court to the employment of the two boys is sustained by the record, and the conclusion of the trial court reached therefrom is founded upon applicable local decisions.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that:

> "It is recognized that generally the insured and all the persons working for him for wages in his business are excluded from the insurance. A cardinal object of the insurance is to distinguish between the public and those engaged in the business and to include the latter and to exclude the former."

in conflict with the case of *Daub* v. *Maryland Casualty Company*, 148 S. W. (2d) 58, l. c. 59-60 (certiorari quashed *State* v. *Hughes et al.*, 349 Mo. 1139), in which the St. Louis Court of Appeals holds:

> "The words, employed and employee, as used in insurance policies, generally denote regular employment as distinguished from occasional, incidental or casual employment. It is in this sense, we think, that the word 'employed' is used in the policy with which we are here concerned. The obvious purpose of the restrictive words 'not employed' is to exclude from coverage any person regularly employed, or in other words, any regular employee, not a mere occasional, incidental or casual employee".

and which the Circuit Court of Appeals was bound to follow.

2. In holding that the employment of Raymond Hayes and Curtis Palmer was not casual, under decisions interpreting the Missouri Workmen's Compensation Act.

3. In holding that the rides in the insured truck to and from the place where the two boys were working was part of their employment in the regular business of the insured, under decisions interpreting the Missouri Workmen's Compensation Act.

4. In holding that on the facts found specially the claims asserted were not as a matter of law within the coverage of the policy and that the plaintiff was entitled to a declaratory judgment to that effect.

Reasons for Granting the Writ.

1. This case was tried by the District Court and presented to the Circuit Court of Appeals on the theory that the policy of insurance was a Missouri contract, and that in an action for a declaratory judgment interpreting the provisions of the policy, where jurisdiction is founded on diversity of citizenship, the Federal Courts are bound by applicable decisions of the intermediate courts of Missouri in the absence of convincing evidence that the highest court of the state would decide differently. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817; *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 58 S. Ct. 860; *Rosenthal* v. *New York Life Insurance Co.*, 304 U. S. 263, 58 S. Ct. 874; *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464, 61 S. Ct. 336, l. c. 338. The opinion of the Circuit Court of Appeals, declaring a new "general rule", without benefit of authority, reversing the judgment of the District Court, founded on local decisions, with which the opinion of the *of the* Circuit Court of Appeals is in conflict, is subject to review by this Court. Under the above cited decisions of this Court, the judgment of the District Court should be affirmed.

2. The controversy in this case centered upon the issue of whether or not the two boys who were injured, one of

them fatally, were employees of the respondent's insured within the purview of the policy. The District Court found that the boys were casual employees, under the definition of casual employment announced by the St. Louis Court of Appeals in *Daub* v. *Maryland Casualty Company*, 148 S. W. (2d) 58, and cases cited therein. The opinion of the Circuit Court of Appeals is in conflict with the decision of the St. Louis Court of Appeals in the *Daub* case, and is also in conflict with the decision of the Supreme Court of Missouri, quashing certiorari in *Daub* v. *Maryland Casualty Company*, reported in *State* v. *Hughes, et al.*, 349 Mo. 1139, 164 S. W. (2d) 274.

The facts in *Daub* v. *Maryland Casualty Company, supra*, were that a sixteen year old boy was injured while doing chores about a dwelling house of an insured under a public liability similar to the policy in the instant case. The St. Louis Court of Appeals held that the word "employee" as used in an exclusionary clause of the policy was ambiguous, and should be given the construction most favorable to the insured.

In construing the policy, the court held that the word employee "is commonly used as signifying continuous service, or as designating a person who gives his whole time and service to another for a financial consideration, or as designating a person who performs services for another for a financial consideration, exclusive of casual employment, or a person in constant and continuous service, or a person having some permanent employment or position, or a person who renders regular and continued services not limited to a particular transaction, or a person having a fixed tenure or position".

The trial court applied this test to the employment of Raymond Hayes and Curtis Palmer and held that the employment of the two boys by the insured should be characterized as "occasional, incidental, or casual employment."

The opinion of the Circuit Court of Appeals attempts to distinguish the instant case from the facts of the *Daub* case by holding that the boys in the instant case were engaged in the business of the insured, while the boy in the *Daub* case was working at chores on the premises of the insured. This opinion is not sustained by the record. The employment of Curtis Palmer consisted of nothing more than doing chores and odd jobs about the premises of the insured at irregular intervals. Raymond Hayes was doing nothing more than occasional work, which the Court of Appeals concedes might be called incidental to the business of the insured. This line of reasoning not only fails in the face of the record, but is in conflict with the decision of the Kansas City Court of Appeals in *Eisen* v. *John Hancock Mutual Life Insurance Company*, 91 S. W. (2d) 81, l. c. 87. (Cited in the *Daub* case), which holds that an occasional worker in a department store, not being regularly employed, did not continue to be an employee within the meaning of a group insurance policy.

The opinion of the Circuit Court of Appeals, which would limit the scope of the *Daub* case to boys doing chores around dwelling houses, is clearly in conflict with the applicable Missouri decision of that case, and should be reviewed by this Court.

3. The District Court followed the definition of casual employment prescribed by the Missouri Courts for interpretation of insurance policies. The opinion of the Circuit Court of Appeals reversing the judgment of the District Court on this point, is founded on definitions of casual employment under the Missouri Workmen's Compensation Act, which are not applicable to the instant case.

This Court has held in the case of *United States* v. *American Trucking Assn's*, 310 U. S. 534, 60 S. Ct. 1059, 1065 that the word employee is not a word of art. It takes color from

its surroundings and frequently is carefully defined by the statute where it appears.

The Missouri Workmen's Compensation Act defines casual employment as follows:

> "Sec. 3695 (d) An employee who is employed by the same employer for more than five and one-half consecutive work days shall for the purpose of this chapter be considered a regular and not a casual employee (R. S. Mo. 1939)."

Since the employment in this case was not consecutive and would have ended for both boys in less than five and one-half days work, the employment would, under the definition of the statute, be casual employment. However, avoiding the statute, the Circuit Court of Appeals held that the employment was not casual under three Missouri decisions interpreting the Act, none of which are applicable under the law or facts to the instant case.

In each of the cases cited by the Circuit Court of Appeals, *Sonnenberg* v. *Berg's Market*, 227 Mo. App. 391, 55 S. W. (2d) 494; *March* v. *Bernardin*, 229 Mo. App. 246, 76 S. W. (2d) 706 and *Carrigan* v. *Western Radio Company*, 226 Mo. App. 468, 44 S. W. (2d) 245, the opinions take great pains to point out that they only seek to determine the intention of the legislature in making the statutory definition. With much care, these opinions differentiate between the terms "casual employee" and "casual employment", and hold that it was the intention of the legislature that the status of the employee be determined by the nature of the work he was doing and not by the terms of his employment. Had the *Daub* case held that persons engaged in regular employment for the insured were excluded then these opinions might have some value. But the *Daub* case holds that the obvious purpose of the restrictive words was to exclude those regularly employed as distinguished from those engaged in regular employment.

The cases relied on by the Circuit Court of appeals go so far as to hold that even though the employee may not be a regular employee, and is a casual employee, that if the work he is doing is regular, then he is under the Act.

The Daub case clearly makes this distinction in its deciding paragraph where it says:

> "It is clear that Winton Meyer, at the time of his injury, was not regularly employed by plaintiffs, or a regular employee of plaintiffs, and he is therefore not excluded from the coverage of the policy."

Nor are these decisions applicable to the instant case for the reason that they are interpretations of an exclusive statute, which does not add to our supplement the common law, but is substitutiontial in character. *New Amsterdam Casualty Co.* v. *Boaz, Kiel Const. Co.* (C. C. A. 8), 115 F. (2d) 950. *Elihinger* v. *Wolf House Furnishing Co.* 230 Mo. App. 648, 72 S. W. (2d) 144; *Smith* v. *Kiel* (Mo. App.), 115 S. W. (2d) 38. The word "Casual" as used in the act, does not refer to the employing of the particular employee, but to the employment or work the employees is engaged to do. *Tokash* v. *General Baking Co.*, 349 Mo. 767, 163 S. W. (2d) 554.

In construing the act, the courts have held that doubtful cases should be resolved in favor of the servant. *Carrigan* v. *Western Radio Co., supra,* and that it should be liberally construed in furtherance of its purpose to provide compensation for all accidental injuries arising out of and in the course of the employment. *Howes* v. *Stark Bros. Nurseries and Orchards Co.*, 223 Mo. App. 793, 22 S. W. (2d) 839.

The Circuit Court of Appeals apparently overlooked these principles in applying the act to the instant case to deprive the employees therein of the coverage of the policy. However, as the decisions cited by the Circuit Court of Appeals interpreting the act, are not applicable to the instant case, the definition of casual employment purported

to have been established by the Circuit Court of Appeals is without authority and the judgment of the trial court should be affirmed.

4. The decision of the Circuit Court of Appeals that the conclusion of the trial court was erroneous because the ride to and from the slab pile was part of the employment of the two boys is likewise based upon Missouri decisions interpreting the Workmen's Compensation Act.

5. The serious and disturbing element in the opinion of the Circuit Court of Appeals is the complete and entire misapprehension of the purpose of the exclusion clause. That this statement of the object of the insurance will cause the utmost confusion is apparent from a comparison of the statement of the Missouri Court with that of the Circuit Court of Apeals.

The Missouri Court says:

> "The obvious purpose of the restrictive words 'not employed' is to exclude from coverage any person regularly employed, or in other words, any regular employee, not a mere occasional, incidental or casual employee."

The Circuit Court of Appeals says:

> "A cardinal object of the insurance is to distinguish between the public and those engaged in the business, and to include the former and to exclude the latter."

Is there a conflict?

To apply the test in the Daub case we ask this question. Was he regularly employed? If not he is covered by the policy. But the Circuit Court of Appeals says, he may not have been regularly employed, yet if he was engaged in the business of the insured, he is not covered.

The wording of the exclusion clause demonstrates the utter fallacy of this interpretation for it excludes "*any employee*" who is "*engaged in the business.*" He must be

first "an employee", and second "engaged in the business". But under the opinion of the Circuit Court of Appeals, whether he be an employee or not is of no consequence and may as well have been omitted from the clause. The object of the insurance could not have been, as the Court of Appeals said, to distinguish between the public and those engaged in the business of the assured or there would have been no reason whatsoever for using the term any employee. The Missouri Courts have perceived the distinction and have followed the correct rule.

The clear result is that in future cases decided in the Missouri Courts—the question to be answered to determine liability is—was he a regular employee, while all litigant insurance companies having diversity of citizenship and in which over $3000 is involved may escape liability in almost all cases by going to Federal Court and having the case decided on the answer to the question, was he engaged in the business of the insured.

It was to prevent the hopeless confusion and injustice arising from such a situation that *Erie* v. *Tompkins* became the law of this land.

6. The purpose of the insurance contract, which governs its interpretations, is clearly to furnish coverage to policyholders from claims of injured employees who are not entitled to the benefits of the Workmen's Compensation Act. Therefore, the opinion of the Circuit Court of Appeals fails to concur with the decisions of the Missouri Courts on this point.

The evidence in the case at bar shows that the insured did not have enough workers to come within the provisions of the Workmen's Compensation Act. Public liability policies of the kind at bar are, in many situations, issued to employers in connection with employer's liability policies applicable to injuries to employees coming under the pro-

visions of the workmen's compensation law. Since the employer's liability policies provide for coverage as to compensation claims, it naturally follows that the public liability policies similar to the policy at bar, provide that they shall not cover such situations; in short, the employer's liability policies afford coverage for situations arising under the workmen's compensation act which supersede common law liability situations, while policies in the nature of the one herein at issue provide for all common law negligence cases resulting from the operation of the insured vehicle.

The Missouri Court in *Daub* v. *Maryland Casualty Company, supra,* took cognizance of this aspect of the insurance policy similar to the one at bar when it cited the case of *Weiss* v. *Employer's Liability Assur. Corp., Ltd.,* 131 Misc. Rep. 301, 226 N. Y. S. 732 in its decision. In that case a boy was engaged by the operator of a motion picture theatre to rewind the reels. He was injured at the theatre and the insurance company which had issued a public liability insurance policy to the theatre company denied liability because its policy insured against injuries suffered by persons "other than employees". In holding that the boy was not an employee within the meaning of the policy, the court said:

> "We think that the word 'employee' as used in an indemnity policy in this state is generally understood to limit the liability of the insurer, so as to exclude claims which would entitle the injured person to compensation under the Workmen's Compensation Law."

If this opinion is permitted to stand, no coverage is available through standard form public liability policies, or workmen's Compensation Policies, to the large group of risks such as the one in this case, until such time as all present standard form policies of public liability and employer's liability policies have been rewritten in accordance

with the holdings of the Circuit Court of Appeals in this case. Manifestly the premiums charged for public liability and employer's liability policies are such as contemplate full coverage. Yet this opinion provides a loophole for insurance companies to escape liability from a risk obviously intended to be covered. The profits accruing to insurance companies through avoidance of these liabilities, constitute unlawful and illgotten gains, and they should not be permitted to so profit as a matter of public policy.

7. There is another matter of grave concern to the courts and to the public in the opinion of the Circuit Court of Appeals. This opinion should be reviewed by this Court for the reason that the Circuit Court of Appeals in setting aside the findings of fact by the District Court and substituting its own conclusion for that of the District Court in reversing the judgment has entered a decision in conflict with the rulings of numerous other Circuit Courts of Appeals under the provisions of Rule 52 (a) of the Rules of Civil Procedure.

Under the provisions of Rule 52 (a), requests for findings are not necessary for purpose of review, and findings of fact entered by the trial court shall not be set aside unless clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses.

The interpretation of Rule 52 (a) generally followed by the various circuit courts of appeals is that all conflicts in the evidence are presumed to have been resolved in favor of the party for whom the trial court enters judgment, and the findings of the trial court are presumed to be correct. *Lowden* v. *Hansen* (C. C. A. Minn.), 134 F. (2d) 348; *Adam Hat Stores* v. *Lefco* (C. C. A. Pa.), 134 F. (2d) —; *Walling* v. *Rocklin* (C. C. A. Iowa), 132 F. (2d) 3; *Smalls* v. *O'Malley* (C. C. A. Neb.), 127 F. (2d) 410. It is further held that only in cases where susbtantially all of the testimony was in the form of documentary evidence, or depositions, so that the

district court was in no better position than the appellate court to determine the credibility of the evidence, is it permissible for the reviewing court to set aside the findings of the lower court. *Equitable Life Assur. Soc. of U. S.* v. *Irelan* (C. C. A. Mont.), 123 F. (2d) 462; *Himmel Bros. Co.* v. *Serrick Corp.* (C. C. A. Ind.), 122 F. (2d) 740.

In the case of *Gary Theatre Co.* v. *Columbia Pictures Corporation* (C. C. A. 7) 120 F. (2d) 891, the decision of the court clearly states the accepted interpretation of Rule 52 (a). At page 892, the court said:

> "The case was tried without a jury and the court entered special findings of fact as contemplated by Rule 52 (a) * * *. Under Rule 41 (b) the judgment, supported by findings, was an adjudication upon the merits, inasmuch as defendants moved for dismissal upon the ground that, upon the facts and the law, plaintiff had shown no right to relief. Consequently our question is whether the findings are supported by the evidence. Under Rule 52 (a) we cannot set them aside unless they are clearly erroneous, and, by the same token we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses * * *.
>
> "Whether the trial tribunal be jury or judge, the inference to be drawn from the facts and circumstances submitted and whether in any particular case the facts justify the ultimate findings are questions for such tribunal subject to revision for error of law. Where parties may differ as to the correct solution of the factual problem faced, it is the duty of a court of review to refrain from attempting to substitute its findings for those of the trial court. It matters not that we might have arrived at a conclusion at variance with that of the trial court. Where as here the trial tribunal has observed the witnesses and has made voluminous detailed findings supported by substantial evidence, we are unable to say that the situation contemplated by

the rule,—that the findings are clearly erroneous,—is presented. * * *

"To determine the question in favor of plaintiff would necessitate the substitution of our judgment upon the facts for that of the trial court. It would require us to hold either as a matter of law that a conspiracy has been established or that the priority of runs and clearance practiced whereby the plaintiff was placed in the same category as the "B" theatres in South Chicago created as a matter of law an unreasonable restriction in Interstate Commerce. This we do not believe we are justified in doing."

In the instant case, the Circuit Court of Appeals felt itself justified in holding that the trial court's description of the employment of Raymond Hayes and Curtis Palmer was a conclusion of law, and that under what the Circuit Court of Appeals termed were the "facts found specially" the claims asserted against the insured were not, as a matter of law, within the coverage of the policy.

The description of the employment of the two boys might easily under applicable decisions be termed a finding of ultimate facts. *Woldson* v. *Bauman* (C. C. A. Idaho), 132 F. (2d) 622; *Gay Games* v. *Smith* (C. C. A. 7), 132 F. (2d) 930, 932; *Walling* v. *Rocklin* (C. C. A. 8), 132 F. (2d) 3, 6. However, regardless of whether the finding the Circuit Court of Appeals found objectionable was a conclusion of law or a finding of ultimate fact, the record clearly shows that the ruling of the court on a question of local law was correct, and it should not be disturbed on appeal. *Palmer* v. *Hoffman*, 63 S. Ct. 477; *Securities & Exchange Commission* v. *Chenery Corporation*, 63 S. Ct. 454.

The question of whether or not the Circuit Court of Appeals was justified in reversing the judgment of the District Court upon the three "requested findings of fact" submitted by the respondent to the lower court after an opinion and

the court's finding of fact had been entered in the case, should be reviewed by this Court. Examination of these "requested findings of fact" reveals that, stripped of the legal conclusions inserted between the findings of actual fact by the respondent, they are the identical recital of the facts of the case entered by the trial court over its own signature. The Circuit Court of Appeals, obviously misled by the inferences gleaned from this confusion of the issues created by the respondent as its only hope of reversing the judgment of the lower court on appeal, substituted its own conclusion for that of the trial court, disregarding the rule of interpretation that if there is an ambiguity in a finding of fact, the reviewing court must accept the interpretation which supports the judgment. *Maryland Casualty Co.* v. *Stark* (C. C. A. 9), 109 F. (2d) 212, 215.

In view of the conflict in the opinion of the Circuit Court of Appeals with the decisions of the other circuit courts of appeals as above outlined, this court should exercise its powers of supervision by granting certiorari to review the decision of the Circuit Court of Appeals.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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No. 293.

Supreme Court of the United States

OCTOBER TERM, 1943.

A. F. BROOKS, DOING BUSINESS AS EAST SIDE ICE & FUEL COMPANY, JAMES BROOKS, WILLIAM FRED HAYES AND MAGGIE MAY HAYES, CURTIS PALMER AND ROBERT HOOPS, PETITIONERS,

VS.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Of Counsel.

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STATEMENT.

Due to the fact that petitioners' statement appearing in the petition for writ of certiorari is somewhat inaccurate and misleading, counsel for respondent desire to add the following suggestions and corrections thereto. The case was tried before the court without the aid of a jury, and the evidence relative to the employment by A. F. Brooks of Raymond Hayes and Curtis Palmer was undisputed and uncontradicted.

At the conclusion of the trial the plaintiff below, who is respondent here, and the defendants, the petitioners here, each submitted findings of fact and conclusions of law (Tr. 213). The trial court, on the same date that its own findings of fact were filed, also marked as given plaintiff's requested findings of fact, 1, 2, 3, 4, 5, 6, 7, 9, and 11 (Tr. 224), and thereafter advised counsel for all the parties by letter that plaintiff's said findings of fact had been marked as given (Tr. 227). Plaintiff's given findings of fact 5, 6 and 7 are set forth in the opinion of the Circuit Court of Appeals (Tr. 237, 238). The Circuit Court of Appeals upon examination of the record was satisfied that such findings were in accord with the evidence and reflected all the facts material to a decision (Tr. 238-9).

As has been stated, the evidence in the case relative to the employment of Hayes and Palmer was uncontradicted, and the trial court's finding that at the time of the accident, which resulted in their injuries, they were riding in the truck under an arrangement that they would be taken to and returned from the slab pile to Brooks's place of business at Joplin, Missouri (Tr. 216, 225), was supported by the evidence and in full accord therewith. They were instructed to and did report each morning for work at Brooks' wood yard at Joplin, Missouri (Tr. 114, 115, 116), and were hauled by truck to and from the slab pile (Tr. 112, 117, 120, 124), which was located 35 miles from Joplin, for the reason that they had no other means of transportation (Tr. 115, 174). At the time Hayes and Palmer were employed by Brooks, he contemplated taking them back and forth from the wood yard at Joplin to the slab pile (Tr. 115). It had been his usual custom and practice to transport the employees, who were helping him saw wood, from his place of business at Joplin to the slab pile and return. These two employees were instructed to report for work at Brooks's place of business in Joplin, Missouri (Tr. 116).

The accident in question occurred in the evening, while Hayes and Palmer were being transported by the assured's truck from the slab pile to Brooks's place of business at Joplin, Missouri, under the arrangement above referred to. There was no ambiguity or conflict between the general findings of fact made by the trial court, and the facts found specially at the request of plaintiff, for the reason that under each of said findings the court found as a matter of fact that Hayes and Palmer at the time of the accident were riding in the truck from the slab pile to Brooks's wood yard at Joplin, Missouri, under an arrangement that they would be taken to and returned from the place of employment in the assured's truck (Tr. 216-225).

It was the contention of the respondent in the Circuit Court of Appeals that its motion for judgment offered at the conclusion of all the evidence should have been sustained, and that the trial court erred in overruling the same. Its position was, that, at the time of the accident in question Palmer and Hayes were employees of the insured, and that liability in respect to them and for their injuries was excluded from the coverage of the policy by the exclusion clause of the policy set forth on page 4 of petitioners' statement (Tr. 234). It was contended by respondent that under the uncontradicted evidence in the case, Hayes and Palmer were employees and were engaged in the business of Brooks at the time of the accident in which they were injured, and, under the exclusion clause of the policy, respondent was entitled to a judgment of non-liability. Both the trial court, and the Circuit Court of Appeals, found that the insured Brooks was engaged in operating, among other things, a fuel yard at Joplin, Missouri; that it was a part of such operation to obtain wood from points outside of Joplin; that in the course of his business it was necessary for him each summer to procure a supply of stove wood for the coming winter (Tr. 237).

Prior to August 31, 1941, the date of the accident in question, Brooks had bought a slab pile located about 35

miles from Joplin for the purpose of procuring therefrom his winter supply of stove wood. It was his usual procedure to cut the lumber at the site of the slab pile to suitable lengths for use as stove wood. All of this was necessary to, and a part of his regular business. Brooks had hired Palmer and Hayes to assist in sawing and bringing in the wood at the slab pile. He agreed to pay them $1 per day for their services and their employment was to last until the slab pile was sawed and hauled to the wood yard. It was contemplated that this would take perhaps a week or longer.

They were instructed to, and did report each morning, for work, at the wood yard, and were hauled by the insured's truck to and from the slab pile in question. It was understood between them and Brooks that they would be carried to and from the slab pile from the wood yard at Joplin, as they had no other means of transportation. The truck was also used for the purpose of transporting the wood to the wood yard at Joplin from the slab pile.

Under these facts, concurred in by both the trial and the appellate court, the Circuit Court of Appeals held that Hayes and Palmer at the time of the accident in question were employees of Brooks, the insured, and were injured while engaged in his business. The statement contained in the findings of fact of the trial court, to the effect that Raymond Hayes and Curtis Palmer at the time of the accident were not engaged in the performance of the duties for which they were employed by the said A. F. Brooks, and that their employment should be described by the words "occasional, incidental or casual" employment, consisted of no more than a statement of legal conclusion, which was not supported by the evidence in the case, or by the facts specially found by the court, and was in direct conflict and contrary thereto.

On page 7 of the petition and statement of fact the petitioners state, relative to Raymond Hayes: "His duties were to bring wood to the saw at the place where sawing

was being done (R. 131). The work commenced when he got to the slab pile and ceased when the sawing stopped." This is doubtless an inadvertent misquotation of the witness' testimony. The witness merely stated that Hayes's duties in carrying wood to the saw ceased when the saw stopped. The witness had previously testified that he expected when he hired Hayes and Palmer to take them back and forth to work in his truck (Tr. 120-124), and that both Hayes and Palmer had been instructed to report for work at his place of business in Joplin each morning (Tr. 116). In commenting upon the relationship between Hayes and Brooks, on page 8 of petitioners' statement, it is intimated that Palmer was merely employed to do chores around the wood yard. This statement was true as to Palmer's relationship to Brooks prior to his employment at the slab pile, but is not true as to the arrangement for that particular work.

The arrangement between Brooks and Palmer was the same, namely, that they should report at the wood yard at 7:30 each morning; they would be transported from the wood yard at Joplin to and from the slab pile 35 miles away; they would each receive the sum of $1 per day for their services; and their employment was to last until the work of sawing up the slab pile and transporting the wood to Joplin was completed; and on occasions it was a part of their duties to unload the truck when it arrived at the wood yard at Joplin at the end of the day's work.

The insured, A. F. Brooks, whose testimony was in no wise disputed, testified relative to the employment of Hayes and Palmer as follows (Tr. 116-7):

"Q. And who was it that was in charge of that work?
A. On what work?
Q. The sawing down there?
A. I was.
Q. You were the boss?
A. Yes, sir.

Q. And you were the employer, weren't you?

A. Yes, sir.

Q. Of all these four men who were working under you?

A. Yes, sir.

Q. They were working under your order and direction as the boss on the Job?

A. Yes, sir.

Q. And you were the fellow that told them when we are going to start work and when we will quit work, that is right, isn't it?

A. Well, we did not work along that line. Whenever we got there, I got things ready and I didn't have to order them around. They were all considerate and knew what we was going to do.

(fol. 49) Q. Well, that is right, but I say you were the fellow had the authority to do that?

A. Yes, sir.

Q. And it was your wood and your business, wasn't it?

A. Yes, sir."

He further testified as follows (Tr. 123):

"Q. Now, you paid your help, paid your employees by the week, didn't you?

A. Yes, sir.

Q. And that is the way you intended to pay Hayes and Palmer?

A. Yes, sir.

Q. And you intended to use this particular crew that was in your employ and helping you in the Boulder City sawing job, you intended to stay on that job until it was finished, didn't you?

(fol. 58) A. Yes, sir."

* * * * * * *

Brooks further testified (Tr. 124):

"A. Well, they knew they could work; if they did the work properly they would have a job, they knew that.

Q. They knew then in the event they did the work properly you intended to keep them on the job?

A. Yes, sir.

Q. And in your employ, didn't you?

A. Yes, sir.

Q. And of course you expected when you hired Hayes and Palmer to take them back and forth to work (fol. 59). In your truck, didn't you?

A. Yes, sir.

* * * * * * *

Q. And you intended to pay both Hayes and Palmer at the end of the week, of course, didn't you?

A. Yes, sir.

Q. Just like you would all your other employees?

A. Yes, sir."

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The writ should be denied for the reason that petitioners failed to serve on counsel for respondent a notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief within ten days after the filing thereof in this court, in violation of the terms and provisions of Section 3, Rule 38, of this court.

II.

The opinion of the Circuit Court of Appeals is in no wise in conflict with applicable local law of Missouri and not in conflict with the rules laid down in the Missouri cases of *Daub* v. *Maryland Casualty Co.*, 148 S. W. 2d 58, and *State ex rel.* v. *Hughes*, 349 Mo. 1139, 164 S. W. 2d 274. The Circuit Court of Appeals properly applied the rules of law laid down by the Supreme Court of Missouri in determining, that as a matter of law, under the undisputed evidence and the findings of fact of the trial court Raymond Hayes and Curtis Palmer were employees of the insured and were injured while engaged in the business of A. F. Brooks, the insured. Under the law of Missouri they were not "casual employees."

State ex rel. Prudential Life Ins. Co. of America v. *Shain et al.*, 127 S. W. 2d 675, 344 Mo. 623.

State ex rel. Mutual Life Ins. Co. of New York v. *Shain*, 126 S. W. 2d 181, 344 Mo. 276.

Skidmore v. *Haggard*, 110 S. W. 2d 726, 341 Mo. 837.

Barnes v. *Real Silk Hosiery Mills*. 108 S. W. 2d 58, 341 Mo. 563.

Reiling v. *Missouri Insurance Co.*, 153 S. W. 2d 79.

A. J. Meyer & Co. v. *Unemployment Compensation Commission*, 152 S. W. 2d 184, 348 Mo. 147.

Corder v. *Morgan Roofing Co.*, (Mo. Sup.) 166 S. W. 2d 455.

Bernat v. *Star-Chronicle Pub. Co.*, 84 S. W. 2d 429.

Dohring v. *Kansas City*, 71 S. W. 2d 170.

State ex rel. Union Electric Light & Power Co. v. *Public Service Commission of Missouri*, 84 S. W. 2d 905, 337 Mo. 419.

Tokash v. *General Baking Co.*, 163 S. W. 2d 554, 349 Mo. 767.

III.

The employment of Hayes and Palmer was not casual under the law of Missouri. The Circuit Court of Appeals correctly followed the controlling Missouri decisions in determining that the employment of Hayes and Palmer was not casual.

Tokash v. *General Baking Co.*, 163 S. W. 2d 554, 349 Mo. 767.

Sonnenberg v. *Berg's Market*, 55 S. W. 2d 494, 227 Mo. App. 391.

March v. *Bernardin*, 76 S. W. 2d 706, 229 Mo. App. 246.

Carrigan v. *Western Radio Co.*, 44 S. W. 2d 245, 226 Mo. App. 468.

IV.

Under the applicable law of Missouri Hayes and Palmer were engaged in the business of their employer while being transported to and from the work at the slab pile and the opinion of the Court of Appeals correctly followed and applied the Missouri law.

Sylcox v. *National Lead Co.*, 38 S. W. 2d 497, 225 Mo. App. 543.

Howes v. *Stark Bros. Nurseries & Orchards Co.*, 22 S. W. 2d 839, 223 Mo. App. 793.

V.

There was no conflict in the evidence that the Circuit Court of Appeals adopted the facts found by the trial court and had the clear right to reverse the erroneous legal conclusions of the trial court. The writ of certiorari will not be granted merely to review the evidence or inferences drawn from it.

Alabama Power Co. v. *Ickes*, 302 U. S. 464, 58 S. Ct. 300.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 546, 58 S. Ct. 849.

VI.

The Court of Appeals did not misapprehend the purpose and meaning of the exclusion clause.

VII.

The purpose of the policy was not to cover claim of employees not entitled to benefits under workmen compensation acts.

VIII.

The Circuit Court of Appeals did not improperly or illegally set aside findings of fact made by the district court.

ARGUMENT.

I.

Petitioners in violation of Section 3, Rule 38, of this court failed to serve on counsel for respondent the notice provided for in said rule within ten days after the filing of the petition.

The petition for writ of certiorari in this cause was filed in this court on the 26th day of August, 1943. The ten day period for service of notice upon counsel for respondent, as provided under Section 3, Rule 38, of this court expired on September 5, 1943. Neither a notice of the filing of the petition for writ of certiorari, nor printed copies of the record and of the petition for certiorari were served upon counsel for respondent until September 7, 1943. Section 3, Rule 38 of the revised rules of this court, adopted February 13, 1939, effective February 27, 1939, provides that notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, "shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the clerk." The proof of service filed with the clerk in this cause shows that service was not had upon counsel for respondent until September 7, 1943. The time for service was not enlarged by the court, and the failure to give the notice within the prescribed time was a clear violation of Rule 38 and for that reason the petition should be denied.

II.

The opinion of the Circuit Court of Appeals is not in conflict with applicable local law of Missouri and not in conflict with the rules laid down in the Missouri cases of Daub v. Maryland Casualty Co., 148 S. W. 2d 58, and State ex rel. v. Hughes, 349 Mo. 1139, 164 S. W. 2d 724. The court followed and applied the law of Missouri.

In considering whether or not there is any conflict between the opinion of the Circuit Court of Appeals in this case, and applicable law in the State of Missouri, it should be first pointed out that the opinion in the case of *Daub* v. *Maryland Casualty Co.*, 148 S. W. 2d 58, was an opinion, not of the Supreme Court of Missouri, which is the highest court in that state, but of the St. Louis Court of Appeals, which is an intermediate court.

The Supreme Court of Missouri granted certiorari in that case on the grounds of a possible conflict. The only question considered by the Supreme Court of Missouri in the case of *State ex rel.* v. *Hughes,* 349 Mo. 1139, 164 S. W. 2d 724, was whether or not there was any conflict between the opinion of the St. Louis Court of Appeals and any prior opinions or decisions of the Supreme Court of Missouri.

In the certiorari proceeding, the Supreme Court of Missouri did not pass upon the question as to whether or not the construction which was placed upon the language of the insurance policy involved by the St. Louis Court of Appeals was a reasonable or proper one. In its opinion, the Supreme Court of Missouri said:

> "Accordingly we are not concerned with whether the construction placed upon said language is that which the court would have given or whether we deem it a reasonable or proper construction."

It is a cardinal rule of construction in Missouri, that where the language of insurance contracts is plain, there

can be no construction because there is nothing to construe, that courts can only enforce insurance agreements as written, and cannot write provisions in the contract not written by the parties to them. Plain and unambiguous language must be given its plain meaning. The Supreme Court of Missouri has declared that these rules are applicable to restrictive provisions of a policy of insurance.

The Supreme Court of Missouri, *en banc,* in the case of *State ex rel. Prudential Ins. Co. of America* v. *Shain et al.,* 127 S. W. 2d 675, 344 Mo. 623, said l. c. 676-7 S. W. Rep.:

> "Where there is no ambiguity, there is no room for construction. Unequivocal language is to be given its plain meaning though found in an insurance contract. *State ex rel. New York Life Insurance Co.* v. *Trimble,* 306 Mo. 295, 267 S. W. 876. This is so even when considering a restrictive provision of a policy. *Wendorff* v. *Missouri State Life Insurance Co.,* 318 Mo. 363, 1 S. W. 2d 99."

In the case of *State ex rel. Mutual Life Ins. Co. of New York* v. *Shain et al.,* 126 S. W. 2d 181, 344 Mo. 276, the Supreme Court of Missouri said and ruled:

> "The plain language of this policy and slip is without ambiguity, and there is no room for construction. In construing it contrary to that meaning, the Court of Appeals brought its decision into conflict with decisions of this court. Unequivocal language is to be given its plain meaning, though found in an insurance contract.
>
> Courts are without authority to rewrite contracts, even insurance contracts * * *; they discharge their full duty when they ascertain and give effect to the intentions of the parties, as disclosed by the contract they have themselves made. Plain and unambiguous language must be given its plain meaning."

The restrictive clause in the policy involved in the case at bar was very different from the clause in-

volved and construed in the case of *Daub* v. *Maryland Casualty Co., supra.* In the Daub case, the policy covered accidents suffered upon resident premises occupied by the Daubs. The insuring clause of the policy involved in that case granted insurance against liability for injuries suffered by "any person or persons not employed by the insured." The language involved there was entirely different from the language involved in the exclusion clause of the policy in this case. The language in the policy here excluded from the coverage of the policy "any employee" of the insured. In the Daub case, the Missouri courts held that the phrase "any person or persons," which appeared in the policy there involved, was most comprehensive and unambiguous. In the Daub case the phrase "not employed" was used in a restrictive sense. The word "employed" was used as an adjective. In that case, insurance was granted for injuries suffered by "any person or persons not employed by insured." In this case, it was provided that the policy should not apply as to liability for injury or death suffered by "any employee" of the insured. In this case, the word "employee" is used as a noun and, being preceded by the adjective "any" its meaning was in no wise limited or restricted, but was enlarged and extended to cover every sort of relation described by the word "employee." In other words, when preceded by the adjective "any," the noun "employee," as used in the policy in question, necessarily imported every sort of relation of master and servant, or employer and employee.

In the policy in the Daub, case the phrase "any person or persons" was restricted by the phrase "not employed." The word "employed" has an entirely different meaning from the word "employee." The Supreme Court of Missouri recognized this distinction in its opinion in the certiorari case (*State ex rel.* v. *Hughes*, 349 Mo. 1139, 164 S. W. 2d 274). In that case, the Supreme Court of Missouri said:

> "The relation of employer and employee is the same as that of master and servant."

In discussing the meaning of the word "employed," in the Daub case, the court found that one might be employed without being a servant, and cities, as an example, an independent contractor, or an attorney representing his client, and in that connection said:

> "Likewise an attorney is said to be employed by his client but no one would contend that the relation created thereby is that of master and servant."

In the Daub case, the Missouri court held that the meaning of the word "employed" depended upon the question as to whether or not it was restricted or limited by reason of its use in connection with other words. The court did not have before it any question as to the meaning of the term "any employee," but only had before it for determination the meaning of the term "not employed," when used in its restrictive sense to modify and limit the term "any person or persons." As a matter of fact, the St. Louis Court of Appeals held that the bare word "employee" in its broad sense covered the relation which existed between the injured boy and the insured and in that connection said:

> "That the relation in its broad sense existed when Winton was raking leaves or standing on the ladder there could hardly be a question."

The words "employer" and "employee" are the outgrowth of the old terms "master" and "servant."

In the case of *Skidmore* v. *Haggard*, 110 S. W. 2d 726, 341 Mo. 837, the Supreme Court of Missouri declared that the definition of the words "master, servant and independent contractor" made in Section 2 of the American Law Institute's Restatement of Agency, had been adopted by the Supreme Court of Missouri in its opinion in *Barnes* v. *Real Silk Hosiery Mills*, 108 S. W. 2d 58, 341

Mo. 563, and quotes with approval the following definitions:

> "* * * A master is a principal who employs another to perform services in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> A servant is a person employed by a master to perform service in his affiars whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. * * *"

To the same effect was the opinion of the Kansas City Court of Appeals in the case of *Reiling* v. *Missouri Insurance Co.*, 153 S. W. 2d 79.

In the case of *A. J. Meyer & Co.* v. *Unemployment Comp. Commission*, 152 S. W. 2d 184, 348 Mo. 147, the Supreme Court of Missouri declared:

> "The ordinary and usual meaning of unemployment means 'state of being not employed; lack of employment.' The verb employ means 'to make use of the services of; to give employment to; * * * to afford employment', and is a synonym of hire. Employer means 'one who employs, esp. for wages or salary as an employer of workmen.' The term employee means 'one employed by another; one who works for wages or salary in the service of employer.' Webster's New International Dictionary. 'When associated with the idea of service, the word "employ" means to hire or make use of the services of, * * * and implies control by the employer over the means and manner of doing the work.' *Stein* v. *Battenfeld Oil & Grease Company*, 327 Mo. 804, 39 S. W. 2d 345, l. c. 348."

In the case of *Corder* v. *Morgan Roofing Co.*, 166 S. W. 2d 455, the Supreme Court of Missouri recently declared:

> "A servant is a person employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."

In the case of *Bernat* v. *Star-Chronicle Pub. Co.*, 84 S. W. 2d 429, the St. Louis Court of Appeals, in defining the relationship of employer and employee said:

> "However, many other relationships between individuals possess certain or many of the features heretofore noted as relevant to the status of employer and employee, so that in the last analysis the determinative characteristic of the latter relation is usually said to be the retention by the employer of the right to direct the manner and details of the work in all its particulars as well as the control of the final result to be accomplished, coupled, necessarily, with the right and power to discharge for proper cause, which is a logical corollary to the right to control."

In the case at bar, it was clear and undisputed that the insured Brooks was in full control, both over the work being done by Raymond Hayes and Curtis Palmer, and of their activities in that connection. He had the right to, and did direct the manner and details of the work in all of its particulars, had the power and right to discharge, and was in full control of the final result to be accomplished. Clearly, the relationship was such as to come within the definitions of the words "employer" and "employee" as adopted by the Missouri courts. We have heretofore suggested that the meaning of the word "employee" as used in the policy in the case at bar was in no wise restricted or limited by reason of its use in connection with other words, but on the other hand that its meaning was broadened and extended by use of the adjective "any" to include every conceivable relation of employer and employee, and to include every person rendering service for the insured. In the case of *Dohring* v. *Kansas City*, 71 S. W. 2d 170, the Kansas City Court of Appeals said:

> "The word 'any' is equivalent to 'every' or 'all.' *Southern Ry. Co.* v. *Gaston County*, 200 N. C. 780, 158 S. E. 481; *Logan* v. *Small*, 43 Mo. 254."

In the case of *State ex rel. Union Electric Light & Power Co.* v. *Public Service Commission of Missouri*, 84

S. W. 2d 905, 337 Mo. 419, the Supreme Court of Missouri defined the word "any" as follows:

> "The word 'any' is so well understood as hardly to require definition. In *Shaw* v. *Lone Star Building & Loan Association*, 40 S. W. 2d 968, the Texas Court of Civil Appeals had under consideration a statute providing how and in what court 'any action' thereunder should be brought. The court said, 40 S. W. 2d 968, l. c. 969 (1, 2): 'The word "any" is defined and is used in this statute to mean "every" or "all," or "no matter what one." Webster's new International Dictionary. "Any" is also used as a term synonymous with "either" and is given the full force of "every" or "all." ' "

The term "any employee," as used in the case at bar, was very different from the term "any person not employed" as used in the policy involved in the Daub case. Clearly, the relationship between Raymond Hayes and Curtis Palmer and Brooks, the insured, as established by the uncontradicted evidence in the case at bar, came within the meaning of the words "any employee," as those words have been defined by the courts of Missouri. It is the contention of the respondent in this cause that the term "any employee," as used in the policy here involved, is in no wise ambiguous, and that the same was broad and general enough to cover any relationship of employer and employee or of master and servant, whether regular, casual, occasional or otherwise. However, should it be thought that the phrase "any employee" is ambiguous, and that the same should be construed in the same manner as the term "any person or persons not employed by the insured" was construed by the St. Louis Court of Appeals in the Daub case, and there held to mean any employee except casual employees, still the opinion of the Circuit Court of Appeals is in no wise in conflict with the opinion of the St. Louis Court of Appeals.

In its opinion, the Circuit Court of Appeals correctly found and ruled that the nature of the employment of

Hayes and Palmer by Brooks, the insured, was entirely in contrast to the nature of the employment of the injured boy in the Daub case. In that case, the employment was most certainly occasional, incidental or casual as those terms have been defined by the Missouri courts, and was not in direct connection with the conduct of any business operated by the insured.

In the case at bar, the work that Hayes and Palmer were hired to do, and were engaged in, was not a mere chore but was a substantial, ordinary, recurring and necessary part of the insured's regular business of obtaining wood for his fuel yard at Joplin, Missouri, and in selling it there for fuel. The obtaining, transporting and unloading of the wood constituted a substantial part of the insured's business. The work being done involved a steady and continued application throughout the days and until completion. The uncontradicted testimony of Brooks, the insured, established that it had been his custom and practice during the summer months to buy piles of slab wood from saw mills at various locations around Joplin, and by use of a portable saw to cut the wood into proper stove lengths, and to then transport the stove wood to his place of business at Joplin through the use of the trucks operated by him in his business. The purpose was to create a surplus in order to meet his winter demands. In sawing up and transporting the slab wood in question, he was following the same method and procedure that he had followed with reference to other slab piles that he had bought in the previous four years he had operated the business (Tr. 108). In order to work rapidly to keep the job going, and to run the saw to full capacity four employees (including Hayes and Palmer) were necessary (Tr. 111). The fact that the employment of Hayes and Palmer was for a limited period of time did not make their employment casual. The work which they were employed to do, and were doing at the time of their injury, was in direct connection with, and necessary to the operation of the business of the insured.

The Supreme Court of Missouri in the case of *Tokash* v. *General Baking Co.*, 163 S. W. 2d 554, 349 Mo. 767, defines the meaning of the word "casual" when used in connection with an employment as follows; l. c. 556:

> "The lexical meaning of the word 'casual' is as follows: 'Happening or coming to pass without design, and without being foreseen or expected; accidental; fortuitous; coming by chance; coming without regularity; occasional; incidental.' This is the ordinary meaning of the word."

During the period of their employment, Hayes and Palmer gave their entire working day and were performing services for another under his order and direction for a financial consideration. Their services were necessary in the operation of a part of their employer's business. Clearly their employment was not casual, occasional or incidental as those terms were used by the St. Louis Court of Appeals in the Daub case, and under the definitions thereof by the Supreme Court of Missouri.

On page 12 of petitioners' "Reasons for Granting the Writ" it is said:

> "The opinion of the Circuit Court of Appeals attempts to distinguish the instant case from the facts of the Daub case by holding that the boys in the instant case were engaged in the business of the insured, while the boy in the Daub case was working at chores on the premises of the insured. This opinion is not sustained by the record. The employment of Curtis Palmer consisted of nothing more than doing chores and odd jobs about the premises of the insured at irregular intervals. Raymond Hayes was doing nothing more than occasional work, which the Court of Appeals concedes might be called incidental to the business of the insured."

The foregoing statement is clearly a misstatement of the facts as disclosed by the record in this case. Curtis

Palmer, at the time of the accident in question, was engaged in doing exactly the same type of work which Raymond Hayes was doing. He was not employed to do nothing more than chores and odd jobs about the premises of the insured at irregular intervals, but was employed for the purpose of going to the slab pile at a point 35 miles from Joplin, Missouri, to carry wood to the saw so that it might be sawed in proper stove lengths by the insured and another employee. As long as he performed his work satisfactorily, his job was to last until the slab pile had been sawed up and the wood transported to the fuel yard at Joplin. The Circuit Court of Appeals clearly found that the obtaining, transporting and unloading of the wood to be sold as fuel constituted a substantial part of the business of the insured. It was as essential to the proper conduct of that business, that the insured have on hand a sufficient supply of wood to meet his demand, as it was that he have trucks and employees to deliver the wood when sold to customers. In the Daub case, the injured boy was not employed for any special time for any special work at any fixed wage, nor was he engaged in work directly connected with the business of the insured. He merely happened to be upon the premises of the insured and the insured requested him to hold and steady a ladder upon which the insured stood while removing leaves from a gutter. While doing so, the boy suffered an accidental injury.

There was no conflict of any kind or character between the decision of the Circuit Court of Appeals in this case and the ruling and decision of the St. Louis Court of Appeals in the Daub case, and the decision of the Circuit Court of Appeals is and was thoroughly in accord with the established law of Missouri.

III.

The employment of Hayes and Palmer was not casual under the law of Missouri.

Under point 3 of petitioners' "Specifications of Errors to be Urged," and under point 3 of their "Reasons for Granting the Writ," petitioners complain that the opinion of the Circuit Court of Appeals is founded on definitions of casual employment under the Missouri Workmen's Compensation Act and that the cases cited by the Circuit Court of Appeals in its opinion were decisions dealing with the interpretation of the term "casual employment," as used in the Missouri Workmen's Compensation Act. Respondent in this brief, have heretofore cited the opinion of the Supreme Court of Missouri in the case of *Tokash* v. *General Baking Co.*, 163 S. W. 2d 554, 349 Mo. 767, wherein the *lexical* meaning of the word is defined. The plain meaning of the word is the same whether it be used in a statute, in an insurance policy or otherwise.

The cases of *Sonnenberg* v. *Berg's Market*, 227 Mo. App. 391, 55 S. W. 2d 494; *March* v. *Bernardin*, 229 Mo. App. 246, 76 S. W. 2d 706, and *Carrigan* v. *Western Radio Co.*, 226 Mo. App. 468, 44 S. W. 2d 245, laid down the same definition of casual employment as that determined by the Supreme Court of Missouri in *Tokash* v. *General Baking Co.*, and in that case, the case of *Sonnenberg* v. *Berg's Market* is cited, and quoted from, with approval. The cases cited by the Circuit Court of Appeals are the law of Missouri, and the Circuit Court of Appeals clearly followed that law in determining whether or not the employment of Hayes and Palmer was, or was not casual.

There is no conflict between the definition of casual employment contained in these cases, and anything that was said or ruled by the court in the Daub case. The Sonnenberg, March and Carrigan cases were cited as authorities by the Circuit Court of Appeals upon the proposition that the work of gathering, sawing and transport-

ing the wood was not casual but constituted a substantial part of the business of the insured. The decision of the Circuit Court of Appeals, in holding that a person employed to engage in the furtherance of a substantial part of the business of the insured is not a casual employee, is in no wise in conflict with the ruling and holding of the Daub case, and petitioners cite no decisions of the appellate courts of Missouri with which such ruling and holding is in conflict.

IV.

Under applicable law of Missouri Hayes and Palmer were engaged in the business of their employer while being transported to and from the work at the slab pile and the opinion of the Court of Appeals correctly followed and applied the Missouri law.

Under point 3 of Specifications of Errors to be Urged and under point 4 of the "Reasons For Granting The Writ," petitioners claim that the Circuit Court of Appeals erred in ruling and holding that Hayes and Palmer were engaged in the business of the insured while riding from the slab pile to the wood yard of the insured at Joplin, Missouri (a distance of approximately 35 miles), because the decision on this issue is based upon Missouri decisions involving the Missouri Workmen's Compensation Act. Petitioners do not cite any Missouri case with which it is claimed the ruling of the Circuit Court of Appeals on this issue is in conflict.

The Circuit Court of Appeals in its opinion cited the cases of *Sylcox* v. *National Lead Co.*, 225 Mo. App. 543, 38 S. W. 2d 497; *Howes* v. *Stark Bros. Nurseries & Orchards Co.*, 223 Mo. App. 793, 22 S. W. 2d 839, and the opinion of the Circuit Court of Appeals for the Fifth Circuit in *Johnson et al.* v. *Aetna Casualty & Surety Co.* 104 F. 2d 22, as authorities for its finding that the 35 miles of travel by truck between the wood yard at Joplin,

where the boys reported for work, under order of their employer, and the slab pile, was clearly within the employment of the boys in the business of the insured. The fact that the two Missouri cases happened to be the cases under which the Missouri Workmen's Compensation Act was involved, in no wise affects their authority as sustaining the position that if the right to transportation is given (either positively or inferentially) to and from the place of work, the employment begins when the employee boards the vehicle used to transport him and terminates when he is returned to the starting point, and the employee is engaged in the business of the employer while being so transported.

Not only do the petitioners fail, under their "Specifications of Errors to be Urged," and "Reasons for Granting the Writ," to point out wherein this ruling and holding was or is in conflict with the local law of Missouri, but they likewise fail to even refer to this question as being a Question Presented in connection with their application for petition for certiorari. Having failed to do so, this question should not be considered by the court under the provisions of Section 2 of Rule 38 wherein it is provided:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question; the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

V.

There was no conflict in the evidence. The Circuit Court of Appeals adopted the facts found by the trial court and had the clear right to reverse the erroneous legal conclusions of the trial court.

Under point 4 of "Questions Presented" and point 4 of "Specifications of Errors to be Urged," it is asserted that the Circuit Court of Appeals should not have reversed the judgment of the District Court because it was based upon facts found especially after the court had heard controverted testimony and weighed its credibility. As we have heretofore pointed out, the testimony relative to the relationship between the insured Brooks and his employees Hayes and Palmer was not controverted. The defendants offered no evidence upon this issue. The judgment and finding of the Circuit Court of Appeals was based upon the facts found specially by the court. If the trial court reached an erroneous legal conclusion from these facts, the Circuit Court of Appeals certainly had the right to correct that error, and to order and direct the trial court to enter the judgment which it should have entered originally upon the undisputed facts. There was no question involved of credibility or weight of evidence. No question was raised in the Circuit Court of Appeals by petitioners but what the facts as specially found by the trial court in findings of fact 5, 6 and 7 given on the part of the plaintiff below, were based upon, and were substantially supported by the evidence. The Circuit Court of Appeals, in reaching its judgment and decision in this case, based the same upon matters and facts found by the trial court. It correctly held that under these facts the trial court had reached an erroneous conclusion of law. This court has held that in a certiorari proceeding, findings made, after a hearing by the district judge, on undisputed evidence and not questioned by the appellate court, and not without substantial support in the evidence, will be accepted by this court as unassailable.

In the case of *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 58 S. Ct. Rep. 300, this court said, l. c. 58 S. Ct. Rep. 303:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis* v. *Schwartz,* 155 U. S. 631, 636, 637, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356."

This court has likewise held that the granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it.

In *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 546, 58 S. Ct. 849, l. c. 851, this court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. * * * Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support."

In the case at bar, the legal conclusions reached by the Circuit Court of Appeals were based upon general and special findings of fact made by the trial court, which were adopted and concurred in by the Circuit Court of Appeals after a thorough review of the record. It needs no citation of authority to sustain the proposition that the Circuit Court of Appeals had the full right to reverse the judgment of the trial court, if upon the facts concurrently found, the trial court reached an erroneous legal conclusion and decision.

As is pointed out in the opinion of the Circuit Court of Appeals there was no conflict in the evidence and no substantial inconsistency between the general findings of fact made by the tral court and those facts specially found at the instance of the plaintiff (Tr. 238).

VI.

The Court of Appeals did not misapprehend the purpose and meaning of the exclusion clause.

Under point 5 of petitioners' "Reasons for Granting the Writ," it is claimed that the Circuit Court of Appeals entirely misapprehended the purpose of the exclusion clause, and that there is a conflict between the interpretation placed upon the exclusion clause involved in the policy in the case at bar and the interpretation placed by the St. Louis Court of Appeals on the exclusion clause involved in the Daub case.

We have heretofore pointed out in this brief that the two exclusion clauses involved are entirely different, and that the exclusion clause in the policy involved in the case at bar was much broader and all inclusive. It excluded "any employee." This term was broad enough to exclude employees of all kind, character and nature, whether regular, casual or otherwise. The effect of the opinion in the Daub case is to be considered in the light of the facts there involved. When the facts relative to the employment in the Daub case, and the language of the exclusion clause in the policy there involved, are compared with the facts concerning the employment in the case at bar, and with the language of the exclusion clause in the policy here involved, there is no similarity at all between the two cases.

The Circuit Court of Appeals found that the injured parties were employees of the insured, and that they were injured while so employed, and while engaged in the conduct of his business. The Daub case does not hold, that under such circumstances, the employee is not excluded. The Circuit Court of Appeals found that Hayes and Palmer were not casual employees.

On pages 15 and 16 of their "Reasons for Granting the Writ," petitioners admit the exclusion clause in the policy in the case at bar excludes any employee who is en-

gaged in the business of the insured. They then say: "He must be first 'an employee,' and second 'engaged in the business.' " Although that is exactly what the Circuit Court of Appeals found, and the exact way in which that court interpreted the exclusion clause, petitioners then make the following erroneous statement: "But under the opinion of the Circuit Court of Appeals, whether he be an employee or not is of no consequence and may as well have been omitted from the clause." This statement is utterly fallacious and not supported by the opinion.

Under point 5 of their "Reasons for Granting the Writ," petitioners contend that the opinion of the Circuit Court of Appeals is erroneous and in conflict with the decision of the St. Louis Court of Appeals in the Daub case because they assert that the Court of Appeals held that in order to come under the exclusion clause, the injured boys would only have to be engaged in the business of the insured, and not an employee. The answer to this contention is that it is not supported by the opinion, and that the Circuit Court of Appeals did not so rule or hold.

VII.

The purpose of the policy was not to cover claims of employees not entitled to benefits under Workmen's Compensation Acts.

Under point 6 of petitioners' "Reasons for Granting the Writ," it is contended that the purpose of the insurance contract involved "is clearly to furnish coverage to policyholders from claims of injured employees who are not entitled to the benefits of the Workmen's Compensation Act." Petitioners then state that, therefore, the opinion of the Circuit Court of Appeals fails to concur with the decisions of the Missouri courts on this point. However, they fail to point out any decisions of Missouri courts on any such question. Likewise, no such question is raised under "Questions Presented," in the petition for

certiorari or under the "Specifications of Errors to be Urged." The position of petitioners in this regard is also clearly erroneous for the reason that it is a misstatement of fact. A reading of the exclusion clause of the policy, which appears upon page four of the petition for certiorari, shows that four classes of claims were excluded—First, any employee of the insured while engaged in the business of the insured; second, employees while engaged in the operation, maintenance or repair of the automobile; third, any employees to whom the insured may be obligated or held under any workmen's compensation law; and, fourth, to the insured or any member of the family of the insured. The policy therefore excluded liability claims of any employees who were injured while engaged in the business of the insured, and in addition thereto excluded claims of injured employees who were entitled to benefits under any workmen's compensation law. In other words, the policy excluded claims for injuries to employees whether based upon the common law or upon workmen's compensation laws.

Statements appearing under point 6 of "Reasons for Granting the Writ" on pages 16, 17 and 18 of the petition for certiorari, are, not only not founded upon facts, but are entirely outside the record and issues in this case and involve statements which constitute no more than hearsay and conclusions on the part of petitioners.

VIII.

The Circuit Court of Appeals did not set aside findings of fact made by the District Court.

Point 7 of petitioners' "Reasons for Granting the Writ" also deal with matters not raised under "Questions Presented" in the petition for writ of certiorari or of "Specifications of Errors to be Urged."

Under Section 2, Rule 38, of the rules of this court such matters should not be considered. However, there is

no merit whatsoever in the contentions raised under said point 7, for the reason that the Circuit Court of Appeals did not set aside the findings of fact by the district court, and did not substitute its own findings of fact for that of the dstrict court. As we have heretofore pointed out, the Circuit Court of Appeals adopted the general findings of fact made by the district court, and the special findings of fact made by that court at the request of the plaintiff, and based its legal conclusions upon those findings of fact.

The Circuit Court of Appeals found that under the undisputed evidence in the case, the trial court had reached an erroneous legal conclusion. It is true the Circuit Court of Appeals did not concur in the legal conclusion reached by the trial court, but this, it had a perfect right to do. It found, and properly so, that the trial court, upon the facts, had reached an erroneous conclusion. Without such power there would be no reason for appellate courts. None of the cases cited by petitioners under point 7 of reasons for granting the writ, rule or hold that the Circuit Court of Appeals did not have the right to reverse the judgment of the trial court if it concluded that such judgment was erroneous under the law.

In the last paragraph of section 7 of "Petitioners' Reasons for Granting the Writ," it is urged that this court should exercise its power of supervision by granting certiorari to review this judgment "in view of the conflict in the opinion of the Circuit Court of Appeals with the decisions of the other circuit courts."

As we have pointed out no such conflict exists and furthermore no such point is made under "Questions Presented" or "Specifications of Errors to be Urged."

Conclusion.

Wherefore, it is respectfully submitted that petitioners' petition for writ of certiorari should be denied.

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